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No. SC92675

In the
Supreme Court of Missouri

TARA L. WARD, et al.,

Appellants,

v.

WEST COUNTY MOTOR CO., INC. d/b/a
WEST COUNTY BMW

Respondent.

Appeal from the Circuit Court of St. Louis County
The Honorable Richard C. Bresnahan, Judge

AMICUS BRIEF OF THE ATTORNEY GENERAL

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INTEREST OF THE AMICUS

The Attorney General is authorized to submit amicus curiae briefing before the Court under 84.05(f)(4). At issue in this case is the scope and meaning of the Missouri Merchandising Practices Act. Sec. 407.010 et seq. The Missouri Merchandising Practices Act charges the Attorney General with the duty to police the marketplace and "to preserve fundamental honesty, fair play and right dealings in public transactions." *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. W.D. 1973). Decisions from this Court which interpret and apply key provisions of the Act, such as the "unfair practice" provision at issue here, will directly impact the scope of Attorney General's future enforcement actions.

Additionally, the Plaintiffs have pled "unfair practice" theories under the Attorney General's interpretative MPA regulations. 15 CSR 60-8.010 et seq. The Attorney General is able to provide unique insights regarding the history and purpose of the regulations which may aid the Court in its evaluation of the claim before it.

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ARGUMENT

Introduction

The Plaintiffs have alleged that they made deposits with the Defendant for future motor vehicle purchases and that when the deals failed to go through, the Defendant refused to return the Plaintiffs' money. Plaintiffs argued that this conduct was an unfair practice, and correctly pointed the trial court to several of the Attorney General's regulations which stood for such a proposition. Without written opinion, the trial court dismissed the Plaintiffs' MPA claim even though they had set forth four independent MPA theories, premised on different regulations.

The trial court's disposition highlights a worrisome trend—lower courts appear to be misapplying, or ignoring, the Attorney General's interpretative regulations in favor of *an hoc* approach to determining whether a given practice is "unfair" under the Missouri Merchandising Practices Act. Sec. 407.020, (RSMo. 2011). Such an approach was precisely what the Attorney General sought to prevent when promulgating the "unfair practice" regulations in 1994. The trial court's approach, if tolerated, will make future applications of the MPA unpredictable for market participants, all while denying meritorious MPA claims. This Court should reverse the trial court's decision and reaffirm that the Attorney General's regulations "have independent power

as law" to define and clarify the MPA's scope. *Huch v. Charter Comm., Inc.*, 290 S.W.3d 721, 725 (Mo. banc 2009).

I. The History of the MPA Demonstrates that the Attorney General's Interpretative Regulations are Necessarily Binding.

The Attorney General is statutorily authorized to make "rules necessary to the administration and enforcement of the provisions of [Chapter 407]" Sec. 407.145, (RSMo. 2011). In 1994, the Attorney General promulgated a series of regulations that clarified the meaning of key provisions of the MPA, including the term "unfair practices." 15 CSR 60-8.010 et seq. To understand the importance of the Attorney General's unfair practice regulations and the way in which the regulations are designed to interact with one another, it is useful to first consider the history of the MPA and the case law which was considered by the Attorney General when these interpretative regulations were being drafted.

The MPA was enacted in 1967 as a shield against predatory business practices and as a supplement to the preexisting common-law fraud cause of action. *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362 (Mo. App. W.D. 1973). The MPA and its analogs in the other 49 states are "'Little F.T.C. acts," modeled after the Federal Trade Commission Act." *State ex rel. Nixon v. Telco Directory Pub.* 863 S.W.2d 596, 601 (Mo. banc 1993)." As originally drafted, the MPA's prohibition extended only to conduct such as

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"deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact." *Independence Dodge,* 494 S.W.2d at 367. In 1985 however, the General Assembly amended the MPA to include "unfair practices." L.1985, H.B. Nos. 96, 346 & 470, § 1. While the F.T.C. Act had always included the term, this new addition allowed the MPA to reach into numerous abusive practices that did not involve outright fraud or deception.

The term "unfair practice" is "unrestricted, all-encompassing and exceedingly broad." *Ports Petroleum Co., Inc. of Ohio v. Nixon,* 37 S.W.3d 237, 240 (Mo. banc 2001). That was a deliberate legislative choice. When Congress first used the term "unfair practice" nearly a century ago in the F.T.C. Act of 1914, it noted:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress wore to adopt the method of definition, it would undertake an endless task.

H.R. Conf. Rep. No. 1142, 63rd Cong., 2d Sess. (1914).

Thus, the General Assembly approached the "unfair practice" problem

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like Congress did in 1914; it "[did] not attempt to define deceptive practices or fraud, but merely declar[ed] unfair or deceptive acts or practices unlawful ... [thereby] leaving it to the court in each particular instance to declare whether fair dealing has been violated." *State ex rel. Ashcroft v. Marketing Unlimited of America, Inc.,* 613 S.W.2d 440, 445 (Mo.App. E.D. 1981). While this ad hoc basis was the approach courts appeared to utilize immediately after the addition of "unfair practice" to the MPA, this approach created a tension between the term's breadth and the concerns of notice and enforcement predictability among defendants.

These concerns were squarely raised for the first time in *State v. Shaw,* the first criminal MPA case. 847 S.W.2d 768 (Mo. banc. 1993). In *Shaw,* the defendant had committed various violations of the MPA related to his foundation repair and home pest control businesses. *Id.* at 768-770. While he was charged with misrepresentations and deceptive conduct, Shaw was also charged with committing unfair practices when he charged unconscionably high prices for the work he ultimately procured through the fraudulent and deceptive conduct. *Id.* The Court set forth dicta expressing concern regarding the MPA's unfair practices provision stating:

> One can argue convincingly that, when Section 407.020 is invoked in its civil character, leaving the category of prohibited

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> acts broad enough to permit the courts to delineate the limits of the prohibition on a case-by-case basis furthers the remedial purposes of the statute. However, when the statute imposes criminal sanctions, an "unfair practice" standard, without more, stretches too broadly to withstand a due process attack.

Shaw, 847 S.W.2d at 775.

Ultimately, the Court upheld the defendant's conviction for unlawful merchandising practices. *Shaw* 847 S.W.2d. at 776. The Court found that any vagueness of the term "unfair practice" was cured "by virtue of the mens rea requirement" in its criminal application. *Id.* at 775. However, it was not clear whether the civil component would be vulnerable to a future "void for vagueness attack," due to the fact that there was no *mens rea* component to provide a limit in civil actions.

In the same year as *Shaw,* this Court took up *State ex rel. Nixon v. Telco Directory Pub.*, where the Court considered whether "deceptive" conduct as used in the MPA was void for vagueness. 863 S.W.2d 596, 601-2 (Mo. banc 1993). The State argued that the "deceptive conduct" under the MPA included those statements that had the "capacity to deceive" a person. *Id.* While the Court upheld the "deception" provision of the MPA, it did not accept the State's argument. *Id. at* 602. The Court noted that at the time of defendant's

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allegedly deceptive conduct, the Attorney General had not promulgated a regulation that construed the term to cover that conduct. *Id.* The Court specifically noted that:

> In 1986, the legislature removed any reference to federal law from Missouri law, instead granting the attorney general authority to promulgate rules setting out the exact scope of Missouri's law and the meaning of the words employed in the Merchandising Practices Act.

Telco, 863 S.W.2d at 601-2.

The Attorney General spent the next year drafting and promulgating a series of regulations interpreting key provisions of the MPA, including "unfair practice." 15 CSR 60-8.010 et seq. These "unfair practice" regulations sought to address the concerns expressed in *Shaw*'s dicta by "provid[ing] notice to the public..., [specifying] the settled meanings of certain terms used in the enforcement of the Act and provid[ing] notice to the public of their application." 15 CSR 60-8.010 (purpose statement). Thus, the regulations were promulgated to create an objective, legally-enforceable framework for evaluating the term, replacing application on a pure ad-hoc basis. Moreover, the regulations sought to define specific instances of unfairness that drew on existing areas of law. In that respect, each regulation is designed to work together in clarifying the

breadth of the term and to address the longstanding concerns that have arisen over the past century when the FTC Act first prohibited unfair practice.

II. The Unfair Practice Regulations Uniquely Balance the Competing Policy Concerns Related to the Term.

The Attorney General's interpretative regulations for unfair practices contain a general definition of "unfair practice" followed by a series of specific acts and practices which are deemed unfair. The general definition is found in 15 CSR 60-8.020:

> An unfair practice is any practice which:
>
> (A) Either—
>
> 1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or
>
> 2. Is unethical, oppressive or unscrupulous; and
>
> (B) Presents a risk of, or causes, substantial injury to consumers.

This definition is modeled on the F.T.C.'s "Cigarette Rule," which was the first attempt by the F.T.C. in 1964 to provide guidance in interpreting the "unfair practice" provision found in the 1914 Act. The Cigarette Rule directed

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a court to consider:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 245 (1975).

Under the original Cigarette Rule, the F.T.C. treated each of the three elements as an independent and sufficient means to state an "unfair practice." 43 Fed. Reg. 59614 (1978). This open-ended approach taken by the Cigarette Rule came under "criticism of the vagueness and breadth of the unfairness doctrine" during the late 1970s and 1980s, *American Financial Services Ass'n v. F.T.C.*., 767 F.2d 957, 969 (D.C. Cir. 1985), and eventually lead Congress to consider stripping the FTC's unfairness doctrine altogether. David Belt, *The Standard for Determining "Unfair Acts or Practics" under State Unfair Trade Practices Acts,* CONNECTICUT BAR JOURNAL, 80 Conn. B.J. 247, 264 -265 (2006)

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("Belt").

In response, the F.T.C. issued what would become to be known as the "Unfairness Policy Statement" clarifying that the consumer injury requirement is "the primary focus of the F.T.C. Act, and the most important of the [Cigarette Rule] criteria." *Id.* At the time, this along with a significant reduction in enforcement actions by the F.T.C. was enough to satisfy Congress that the FTC's unfairness jurisdiction had practical limits, although the issue continued to develop. *Id.* at 267.[1]

Against this backdrop, the Attorney General promulgated the MPA's general unfairness doctrine in 15 CSR 60-8.020. While the terms are similar to the original Cigarette Rule, 15 CSR 60-8.020 is a unique variation. It transforms the third "Cigarette Rule" element of "injury" into a necessary conditional element. The "offends public policy" and "unscrupulous and

[1] In 1994, the same year that the Attorney General promulgated its MPA "unfairness" regulations, Congress passed further restrictions on the F.T.C.'s unfairness doctrine that are contained in 15 U.S.C. § 45(n). Belt, *supra,* at 255. However, Congress clarified that this amendment to the "unfairness doctrine," and future changes to the FTC's "unfairness jurisdiction" should not be construed as binding on state "unfairness doctrines" like the MPA. Sen. Rep. No. 130, 103d Cong., 2d Sess. 13 (1994).

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unethical conduct" elements are then set forth as alternatives that would each independently state an unfair practice claim. *See Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. App. S.D. 2006) (holding that the trial court's finding of "unfair practice" could be sustained on either ground). This approach appears to be unique to Missouri and has been praised by commentators who have noted that the "Missouri regulation defining 'unfair practice'… perhaps best accommodates the various policy concerns" which had plagued the FTC throughout the years. Belt, *supra* at 261 -262.

Beyond the general test found in 15 CSR 60-8.020, the regulations go on to deem specific acts as "unfair practices" under the MPA. This list includes price gouging,[2] breaches of good faith and fair dealing,[3] duress and undue influence,[4] negative option purchases,[5] intentional unilateral breaches,[6] unconscionable terms or practices,[7] and illegal conduct.[8] Each of the specific

[2] 15 CSR 60-8.021

[3] 15 CSR 60-8.040

[4] 15 CSR 60-8.050

[5] 15 CSR 60-8.060

[6] 15 CSR 60-8.070

[7] 15 CSR 60-8.080

act regulations is stated as a sufficient condition to find an unfair practice. *See e.g.* 15 CSR 60-8.050 ("It is an unfair practice for any person to…"). Thus, satisfying any one of the specific act regulations would be sufficient to state an unfair practice under the MPA.

The specific act regulations were set forth in addition to the general test found in 15 CSR 60-8.020 for two reasons. First in *Shaw* this Court dismissed many the vagueness concerns regarding the other provisions of the MPA such as the fraud and deception portions because those "words employed in Section 407.020 have acquired settled meanings in the law." *Shaw,* 847 S.W.2d at 775. The Attorney General drew on the Court's reasoning in the promulgation of the "unfair practice" rules by specifically articulating common law traditions where the courts refused to enforce oppressive terms of a contract. Good faith and fair dealing, unconscionability, duress, and undue influence are well-known subjects in law, and provide the same practical notice which this Court found acceptable in *Shaw* for concepts like fraud, deception and misrepresentations. *See e.g.* Sec. 400.2-302; (RSMo. 2011); *Funding Systems Leasing Corp. v. King Louie Int'l.* 597 S.W.2d 624, 633-635 (Mo. App. W.D. 1979). The specific act regulations were designed to expressly incorporate these common law traditions and to signal to practitioners that MPA's "unfair

[8] 15 CSR 60-8.090

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practice" jurisprudence did not need to be developed from a clean slate. Rather, courts could draw on the established law to provide predictability for market participants.

The second purpose for these additional rules was to remove an express need to show consumer injury for the conduct proscribed by the specific act regulations. Because the prohibitions are so express or so well-established that consumer injury may be fairly presumed. For instance, a contract term or a negotiation practice which has already been declared to be "unconscionable" by judicial decision is implicitly unfair and injures consumers. To use a recent example, the landlord who unilaterally raised his tenants' rent immediately after the Joplin tornado committed a per se harmful and unfair practice.[9] 15 CSR 60-8.021 (price gouging); 15 CSR 60-8.070 (intentional unilateral breach). In all of these cases, there is no need to analyze the general unfairness definition because all of its elements are subsumed into the specific unfairness regulation. Any issue of vagueness, which is the reason why the general definition's sets forth its elements, is also addressed, because the Attorney

[9] See Attorney General Press Release, Attorney General Koster takes action against Joplin landlord for taking unfair advantage of tornado victims (July 13, 2011) *available at* http://ago.mo.gov/newsreleases/2011/AG_Koster_takes_action_joplin_landlord

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General has promulgated a specific rule that gives notice that these acts are unfair.

Thus the general unfairness regulation in 15 CSR 60-8.050 should only be considered if the plaintiff has not alleged or been able to state a claim under any of the specific unfairness regulations. If a plaintiff has stated such a claim premised on one of the specific regulations, the court should first consider those regulations at issue. If the Court finds that no violation of the specific regulations has been alleged, then the Court should analyze the conduct under the general unfairness regulation.

III. Application of the Attorney General's Regulation to this Case Reveals that the Plaintiffs' Petition has Stated Facts Sufficient to Find an Unfair Practice

Plaintiffs' petition sets forth four theories of unfairness regarding Defendant's refusal to return their deposits:

1. By converting the funds or property paid by Plaintiffs when it failed to apply them to the purchase or lease of a motor vehicle;

2. By failing to act in good faith when it refused to make like-kind refunds of deposits after the sale or lease had been terminated, and before Plaintiffs had taken delivery of a motor vehicle;

3. By using a liquidated-damages clause in its contracts that was really a disguised penalty provision;

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4. By violating Sec. 365.070, RSMo. which allows a buyer to rescind the transaction any time before signing a retail installment contract and taking delivery of the vehicle.

While theories (1), (3), and (4) may not exactly reference one of the specific unfairness regulations, a violation of the "duty of good-faith" facially invokes 15 CSR 60-8.040. Thus, the Court should first analyze whether the alleged conduct of Defendant violates the specific "duty of good faith" regulation, before examining the general regulation unfairness regulation.[10]

[10] Other specific unfairness regulations are raised by the facts alleged in the petition; however, these are not explicitly placed at issue in the briefing of the parties. The withholding of the deposit may have been for the purpose of obtaining leverage over the consumer in order to force them to go through with the underlying car purchase under the guise of merely securing the vehicle temporarily for future purchase. This allegation implicates 15 CSR 60-8.050 which prohibits the use Duress and Undue Influence in connection with a sale of merchandise, this case the underlying sale of the motor vehicle. The Defendant's conduct may also implicate 15 CSR 60-8.080 which prohibits any substantively unconscionable term or any procedurally unconscionable practice. If the Court wishes to reach these issues, they should also be addressed prior to consideration of the general unfairness regulation.

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A. Plaintiffs' Claims Satisfy the Specific Unfair Practice of Violating the Duty of Good Faith

Violations of the duty of good faith are specially identified as unfair practices under 15 CSR 60-8.040, which states:

> It is an unfair practice for any person in connection with the advertisement or sale of merchandise to violate the duty of good faith in solicitation, negotiation and performance, or in any manner fail to act in good faith (see section 400.2-103(1)(b), Restatement (Second) Contracts § 205).

The regulation gives the public clear notice that a violation of the well-established "duty of good faith" is an "unfair practice" and that the injury to a consumer may fairly be presumed. *See State v. Polley*, 2 S.W.3d 887, 890 (Mo. App. W.D. 1999). The petition sets forth fact, that would, if proven, show that the forfeiture term was used by Defendant in bad faith to effect a full forfeiture in cases where the sale transaction failed due to Defendant's own failures, breaches and unlawful conduct. For instance, the petition alleges that the vehicles which were "secured" were in some cases never in the actual possession of the Defendant or that Defendant was not able to obtain the vehicle for the consumer. The petition alleges that one of the transactions had fallen through because the Defendant had failed to secure promised financing

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for the consumer. The petition also alleges that the Defendant had promised that the deposits were in fact refundable in cases.

Each of these actions is an independent violation of the MPA under the provisions that prohibit fraudulent statements, misrepresentations, deceptive practices, and omissions of material facts. Sec. 407.020, (RSMo. 2011). However, the Plaintiffs also correctly raise an unfair practice theory under 15 CSR 60-8.040. A defendant who uses a forfeiture term in a contract to enrich itself for its own failures and violations of law, has not rendered "good faith" in accordance with "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party," Restatement (Second) Contracts § 205. Plaintiffs have alleged an unfair practice under 15 CSR 60-8.040, and thus the trial court's judgment should be reversed on this point alone.

B. Plaintiffs' Claims Satisfy the General Unfairness Definition of 15 CSR 60-8.020

If the Court wishes to reach the other three theories or is not satisfied that the duty of good faith has been violated, the analysis would then shift to whether the general unfairness definition has been satisfied. Under the regulation, the first inquiry is whether Defendant's conduct presents "a risk of, or causes, substantial injury to consumers." 15 CSR 60-8.020. The petition sets forth facts that if proven demonstrate how all six of the Plaintiffs incurred

a financial loss as result of the Defendant's conduct. The petition sufficiently alleges a course of conduct by the Defendant which presents a risk of, and did in fact cause, substantial financial injury to consumers.

With that element satisfied, the Court should next consider whether the conduct at issue "[o]ffends *any* public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions" or "[i]s unethical, oppressive or unscrupulous." 15 CSR 60-8.020 (emphasis added). Again, satisfying either of these elements will sustain the Plaintiffs' unfairness claim. *Schuchmann,* 199 S.W.3d at 233.

The most straight-forward way to demonstrate an unfair practice under 15 CSR 60-8.020 is to show that the conduct offends a public policy set forth in another state statute, or in some cases go as far as facially violating an express state or federal law intended to protect the public.[11] *See e.g. State ex rel. Nixon*

[11] In such cases, 15 CSR 60-8.090 regarding Illegal Conduct would be implicated. This regulation overlaps with the general test found in 15 CSR 60-8.090 that makes unfair any practice which "(A) Violates state or federal law intended to protect the public; and (B) Presents a risk of, or causes substantial injury to consumers." The purpose of 15 CSR 60-8.090 is to make absolutely express that violating a public safety law is unfair under the MPA.

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v. Beer Nuts, Ltd., 29 S.W.3d 828, 838 (Mo. App. E.D. 2000) (unlawful liquor sales under Chapter 311); *State ex rel. Nixon v. Interactive Gaming & Comm. Corp.*, 1997 WL 33545763 (Mo. Cir. 1997) (Unlawful gambling under Chapter 573); *See also Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712, 716 (Mo. App. E.D. 2008) (unlicensed practice of law under Chapter 484). This is a critical function of the regulation, as it allows the Attorney General to use broad remedial powers to enforce other statutes that are not self-enforcing. The Plaintiffs have cited such a statute, when they point to Sec. 365.070, (RSMo. 2011). That statute provides that:

> Until the seller [delivers to the buyer a copy of the installment contract], a buyer who has not received delivery of the motor vehicle may rescind his agreement and receive a refund of all payments made… on account of or in contemplation of the contract.

Sec. 365.070.4, (RSMo. 2011).

The statute's plain text reflects a clear public policy—that a consumer should not be forced to forfeit a deposit made in contemplation of a vehicle purchase. Regardless of how the Defendants have characterized the money at issue, the Plaintiffs' purpose in giving the money was "in contemplation of [a] contract" for the purchase of an automobile. *Id.* This is precisely what the

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plain text and the underlying public policy behind it sought to regulate in Sec. 365.070. The Plaintiffs have satisfied the "public policy" element of 15 CSR 60-8.020 by alleging facts sufficient to show that Defendant's violated the provisions of Sec. 365.070.4 in addition to offending the public policy that it reflects. Thus, their petition sufficiently states an unfair practice under this basis.

While a statutory public policy is the clearest means of satisfying the first disjunctive of 15 CSR 60-8.020, it is not the exclusive means. *See Schuchmann.* 199 S.W.3d at 233. A statute related to the subject matter in an MPA claim does not displace, or render irrelevant, the other alternative and sufficient theories under 15 CSR 60-8.020. Even if Sec. 365.070 was construed in such a way that it did not directly reach the conduct at issue, and the public policy it reflects somehow held to not speak to this transaction, the inquiry is not over. A court still must consider whether the alleged conduct violates public policy as it has been established by "the *common law* of this state." 15 CSR 60-8.020 (emphasis added).[12]

[12] There may be some instances where a statutory scheme is so thoroughly pervasive that it may displace and supplant all other sources of law. Possible examples could include securities and insurance which are already heavily regulated by entire chapters of the Revised Code.

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The Plaintiffs have alleged that the Defendant's conduct violate public policy as reflected by the common law based on conversion and the common law prohibition on punitive liquidated damage terms. Each of these sufficiently states an unfair practice under the MPA.[13]

When a conversion involves a person's money, the tort exists to prevent instances where "[f]unds placed in the custody of another for a specific purpose [are subject to] diversion for [reasons] other than such specified purpose" *Dillard v. Payne*, 615 S.W.2d 53, 55 (Mo. banc 1981). In this context, conversion has been expressly applied when motor vehicle sellers refuse to return deposits to consumers when a deal fails. *Coleman v. Pioneer Studebaker, Inc.*, 403 S.W.2d 948, 951 (Mo. App. 1966) (Motor vehicle dealer's refusal to return deposit made on consumer's automobile constituted conversion). A plaintiff who states an action for conversion in connection with the sale of merchandise, states an unfair practice under the MPA. The petition satisfies 15 CSR 60-8.020 independently under the public policy

[13] There are several other common law issues raised by the facts set forth in Plaintiffs' petition that would also demonstrate a violation of public policy by Defendant's conduct including theories of Money had and Received, unjust enrichment, failure of consideration, and an action for trover. These are not raised by the parties.

provision as well.

Under the common law, "a term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty." Restatement (Second) Contracts § 356. Any forfeiture under such a clause must be a fair representation of the loss that the provision seeks to compensate. *See City of Richmond Heights v. Waite*, 280 S.W.3d 770, 776 (Mo. App. E.D. 2009). Here, the Plaintiffs allege that they were deprived anywhere between $500-$1000 dollars for any purchase that failed, whether due to Defendant's own failure to procure the automobile or from the buyer deciding that the purchase was not appropriate. As written, the clause in the Plaintiffs contracts would purport to apply even if mere seconds had elapsed from the time that the check is handed to the Defendant and the consumer repudiating the deal. Taken in the light most favorable to the petition, these allegations may lead a rational trier of fact to conclude that these amounts are excessive and punitive and have no bearing on any actual damage the Defendant may have incurred. The petition sufficiently alleges that the forfeiture term is an unlawful liquidated damage provision. Thus, the Plaintiffs have stated a fourth theory of unfairness that is independent and sufficient to state a claim under the MPA.

The Court's interpretation of "unfair practice" under the MPA in this

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case is vitally important. It will certainly impact the five consumers who seek the protections of the Act to recover the hundreds of dollars wrongfully taken by Defendants. However, the decision goes beyond those who are party to this case. How "unfair practices" are defined will affect the scope of the Attorney General's future enforcement actions. It will determine whether the six million consumers within this State may enjoy the assurance that their chief law enforcement officer will address new and novel "unfair practices" which arise in the ever-changing modern marketplace. It will also be examined by those in the business community to try and understand whether the scope and reach of the MPA's has changed. These all present significant public policy considerations for the Court; however, there is no need to retread this issue.

The Attorney General was specifically authorized by the legislature to issue clarifying regulations related to the MPA. When promulgating the MPA's unfair practice regulations, the Attorney General considered the difficulties and policy issues encounter by the F.T.C. over the previous 80 years as it sought to clarify the term's scope and meaning. The practical impacts to consumers and businesses were discussed. The rules were opened for public comments. The result of these considerations and discussions is the regulatory scheme contained in 15 CSR 60-8.020. These unique regulations offer courts a comprehensive framework to address an unfair practice questions in a way

which balances the competing policy interests of flexibility for future abuses and predictability for market participants. If the MPA's unfairness regulations are ignored, either selectively or in their entirety, then the meaning of "unfair practice" reverts back to an *ad hoc* system which provides neither protection for consumers or clarity for business.

CONCLUSION

The trial court's ruling should be reversed and the matter remanded.

Respectfully submitted,

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Electronically Filed - Supreme Court - September 11, 2012 - 07:32 PM CDT

Electronically Filed - Supreme Court - September 11, 2012 - 07:32 PM CDT

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on September 11, 2012, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and that a true and correct copy of the foregoing brief were mailed electronically to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,359 words.

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